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Nos. 90-1604 and 90-1606

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

DAN MORALES, ATTORNEY GENERAL OF TEXAS,
PETITIONER,

v.

TRANS WORLD AIRLINES, INC., ET AL.,

ATTORNEY GENERAL OF CALIFORNIA, ET AL.,
PETITIONERS,

v.

TRANS WORLD AIRLINES, INC., ET AL.,

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Dan Morales, Attorney General of Texas, sole Petitioner in No. 90-1604, and Daniel E. Lungren, Attorney General of California, a Petitioner in No. 90-1606, submit this reply to the Brief for the United States as Amicus Curiae ("Brief for the United States") filed herein in response to the Court's order

inviting the Solicitor General to express the views of the United States in these cases.[1]

The States agree with the Solicitor General's recommendation that the Court grant the petition in No. 90-1606 and summarily reverse the judgment below as to all states except Texas. Brief for the United States at 24.[2]

The States must respectfully disagree with the Solicitor General's recommendation that the Court deny review of the preemption issues in both cases. Brief for the United States at 24. The Solicitor General's advice to this Court did not follow the Court's own policy of limiting federal preemption. Without repeating the discussion of this issue contained in the petitions already on file, the States wish to make two points.

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1 Because of the short period of time between the receipt of the Solicitor General's brief and the filing of this reply brief, it has not been possible to obtain the requisite review of the 32 other petitioners in No. 90-1606. Therefore, Attorney General Lungren files this brief on his behalf only. The two petitioners joining in this brief will be referred to as the "States."

2 The States do not, however, agree with the Solicitor General's contingent recommendation that, in the event that the Court decides to review the preemption issue, the Court should only grant review in No. 90-1604 (the Texas case) and hold the petition in No. 90-1606 (the 33-state case). Brief for the United States at 23, fn. 16. Because those 33 states have never properly been in this litigation, review of the preemption decision alone could present those states the pyrrhic victory of winning on one issue of substantive law but having no decision on the jurisdictional issue. The Court should, at a minimum, also grant the petition in No. 90-1606 and summarily reverse the judgment below as to the other 33 states, since the district court lacked personal jurisdiction over them.

1. Now is the time for the Court to visit this issue.

The appellate courts have had ample opportunity to consider the scope of preemption of state law under the Federal Aviation Act, and have proven themselves divided, even in the same circuit.

The Solicitor General himself points the Court to an internal conflict within the Ninth Circuit. One case gives a narrow reading to the preemption question, as the States urge is proper. *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *petition for cert. pending*, No. 91-505. But an opinion handed down this year gives a broad sweep to preemption. *Federal Express Corp. v. California Public Utilities Comm'n*, 936 F.2d 1075 (9th Cir. 1991), *petition for cert. pending*, No. 91-502. Brief for the United States at 13-14.

Of course, as discussed at length in the petitions on file herein, the Ninth Circuit reasoning and result in *West* conflict directly with the reasoning and result reached by the Fifth Circuit here. Other circuits evince similar confusion.

Without rearguing the point at length, the States again urge the Court that a conflict of circuits now exists and that refusing review at this time will only foster further confusion. A dispositive opinion by this Court can bring an end to needless additional conflicting litigation.

2. Finding preemption must be the last resort.

Instead of reviewing the Federal Aviation Act with the intent of making federalism work by *avoiding* preemption, the Solicitor General focused only on those cases that best make the case for *seeking out and finding* preemption.

Rather than see how expansive a reading one can give the preemptive language of the Federal Aviation Act, as the Solicitor General has in effect done, the Court should grant review of these cases to affirm that preemptive language must be given the narrowest reading possible.

All laws "relating to rates, routes, or services" are preempted. 49 U.S.C. § 1305(a)(1). As a necessary corollary, all other laws are not.[3]

While the position taken by the Solicitor General fully and properly advocates the position of the Department of Transportation, the States urge that it does not follow the Court's oft-repeated instruction to "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Primarily, the Solicitor General erred in seeking guidance from the sibyl of ERISA. The sole underpinning of the limitless reading he gives the "relates to" language of the Federal Aviation Act is the broad reading given by the Court to similar language in ERISA. Brief for the United States at 8-9. ERISA is a comprehensive statute which Congress adopted after a careful study of private retirement pension plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990). As it relates to false advertising and consumer protection, the Federal Aviation Act is not at all comprehensive.

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3 It is unnecessary to review legislative history, either to support or to refute preemption. The language of the Act is clear.

Beyond that, the preempting provisions of ERISA "perhaps are not a model of legislative drafting." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). Therefore, reference to ERISA's broadly-preemptive effect, based solely on the similarity of two words–"relates to"–ignores both the flaws of the ERISA language and its fundamental difference from the Federal Aviation Act.

ERISA preemption is not sweeping because of its "relates to" language; rather, that "relates to" language is read broadly because of the wide and inclusive sweep of the comprehensive ERISA scheme. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 482 (1990). No such sweep exists in the Federal Aviation Act, nor should the Court strain to find one.

CONCLUSION

For the reasons stated herein and in the petitions already on file, both petitions for writ of certiorari should be granted.

Respectfully submitted,

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